

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

AND

Docket No. 175,484

## ORDER

The Kansas Workers Compensation Fund appeals from an Award rendered by Administrative Law Judge John D. Clark on May 17, 1995. The Appeals Board heard oral argument September 18, 1995.

## APPEARANCES

The respondent and Allied Mutual Insurance Company appeared by their attorney Jerry M. Ward of Great Bend, Kansas. The respondent and Kansas Association of School Boards appeared by their attorney Rex W. Henoch of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Steven L. Foulston of Wichita, Kansas.

## RECORD AND STIPULATIONS

The Appeals Board reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

## ISSUES

The sole issue to be considered on appeal is whether all or any portion of this Award should be assessed against the Kansas Workers Compensation Fund.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the Award against the Workers Compensation Fund made by the Administrative Law Judge in this case should be reversed.

Claimant testified that in July 1991 he injured his low back and shoulder while moving furniture and waxing floors. Claimant sought treatment for the back but not the shoulder. The back symptoms resolved but the shoulder symptoms did not. Claimant continued to have problems with his shoulder which occasionally required other employees to perform his duties. Claimant also testified that in October of 1992 he was mopping locker rooms when the shoulder began to hurt badly. He thereafter sought medical treatment and Dr. Eyster performed surgery for a torn rotator cuff in December of 1992.

K.S.A. 1987 Supp. 44-567 describes the circumstances under which the Workers Compensation Fund will be liable. An employer who knowingly retains a handicapped employee is relieved of liability for subsequent injury if the subsequent injury would not have occurred but for the preexisting impairment. If the injury would have occurred regardless of the preexisting impairment, the employer may nevertheless be relieved of a portion of the liability if the preexisting impairment contributed to the overall disability resulting from the subsequent compensable injury. K.S.A. 44-567.

Respondent relies upon the testimony of Dr. Eyster to establish the elements necessary to impose liability on the Workers Compensation Fund. The Appeals Board finds, however, that Dr. Eyster's testimony does not support imposing liability on the Fund because Dr. Eyster's testimony reflects a single injury occurring over a period of time, not a second injury caused or contributed to by a preexisting impairment.

Claimant alleged a single injury occurring July 24, 1991 and each and every day through October 21, 1992. Claimant testifies to the onset of symptoms in July of 1991 and continuing problems and aggravations of those symptoms through October 21, 1992. Dr. Eyster had no history of a single traumatic event on either July 24, 1991 or October 21, 1992. He testified that in all likelihood the torn rotator cuff developed as a result of work activities over a period of time, not from a single event. Although Dr. Eyster testified that the torn rotator cuff probably or most likely would not have occurred but for claimant's preexisting bursitis and tendinitis, he does not appear to attribute the bursitis and tendinitis to an on-the-job injury other than the gradual development of that condition leading to the torn rotator cuff. Dr. Eyster also testifies that the bursitis and tendinitis probably contributed twenty percent (20%) of claimant's overall impairment and the tear of the rotator cuff the remaining eighty percent (80%). He does not, however, give any opinion as to when the rotator cuff tore. The testimony leaves open the possibility the rotator cuff tore at the time of claimant's initial injury on July 24, 1991 or gradually over time from claimant's work thereafter. Under the circumstances, the Appeals Board finds respondent has failed to prove two injuries and accordingly the request that the liability be shifted to the Workers Compensation Fund is denied.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark should be, and the same is hereby, reversed.

All benefits paid or payable pursuant to the December 22, 1993 settlement agreement between claimant and respondent are to be paid by respondent. By stipulation 50% of respondent's obligations to be paid by Allied Mutual Insurance and 50% by the Kansas Association of School Boards.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jerry M. Ward, Great Bend, Kansas  
Rex W. Henoch, Kansas City, Kansas  
Steven L. Foulston, Wichita, Kansas  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director